THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In Re: Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates ..... Appellant.

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001283

REPLY TO RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

Blue Granite Water Company (the "Company"), Appellant, files this reply to the return filed by the South Carolina Department of Consumer Affairs (the "Consumer Advocate") on October 8, 2020 ("Return") to the Company's Petition for Writ of Supersedeas (the "Petition"). The Petition seeks a writ of supersedeas from this Court suspending the Commission's unlawful stay of the Company's implementation of rates under bond pursuant to S.C. Code Ann. § 58-5-240(D) (the "Bond Provision"). While the Commission's stay is in effect, the Company must forego the increased revenues it is entitled to by the Bond Provision and suffer from degraded cash liquidity. Further, the Consumer Advocate's Return fails to explain how the Commission is statutorily authorized to stay the implementation of rates under bond given the plain language of the Bond Provision and the Commission's consistent mode of interpreting the Bond Provision.

A. The Petition is ripe for this Court's consideration.

While the request for reconsideration filed with the Commission was not styled as a petition for supersedeas, the process before the Commission complied with Rule 241. Consistent with Rule 241, the Company sought an order lifting the stay in its request for reconsideration of the stay

filed with the Commission. The Consumer Advocate and other parties had an opportunity to file a response, and the Commission denied the Company's request on September 16, 2020, two weeks after the Company's request was filed. The Company's request for rehearing is attached hereto as Exhibit A, and a certified copy of the Commission's denial of reconsideration was attached to the Petition as Exhibit H.

The Return notes that S.C.A.C.R. 241 permits an aggrieved party to seek judicial review of an administrative tribunal's "decision" to support its position that the Commission's stay is not ripe for this Court's review. It is indisputable that the Commission has issued a decision as to whether it should lift its stay—the Commission's unanimous "decision" is memorialized in the directive attached to the Petition as Exhibit H. The Commission's lack of authority to stay the implementation of rates under bond is ripe for this Court's consideration.

B. The Commission does not have authority to approve or not approve the rates under bond.

The Consumer Advocate's argument that the Court's grant of the Petition would permit the Company to implement rates not approved by the Commission demonstrates the Consumer Advocate's fundamental misunderstanding of the Bond Provision and the Commission's authority. Neither the Bond Provision, nor any other statutory provision, requires or permits the Commission's review of the rates to be implemented under bond. The whole purpose of the Bond Provision is to allow a utility to implement rates not approved by the Commission while that utility appeals the rates that the Commission did approve. As explained in the Petition—and as repeatedly held by the Commission—the limited role of the Commission as related to rates under bond is to review the amount of the bond and the surety, both of which the Commission has already approved in this case.[1]

[1] While not relevant to the Petition, the Return incorrectly asserts that the Company has

Contrary to the Consumer Advocate's apparent misunderstanding, the Commission has never asserted authority over a utility's rates under bond, because it does not have the requisite authority. As explained in the Petition, the Commission has repeatedly found that it does not have authority over the rates a utility implements under bond. See, for example, the directive issued in this proceeding on July 15, 2020 attached as Exhibit C to the Petition, as well as the several prior orders attached as Exhibit J to the Petition. While the Bond Provision is not ambiguous, to the extent the Consumer Advocate would argue that there is ambiguity in how the Bond Provision should be interpreted, the Commission's prior orders show a "consistent mode of applying a statute" expressing a lack of discretion as to the rates implemented under bond, a mode of interpretation that should be "given considerable judicial deference." *Bunch v. Cobb*, 273 S.C. 445, 452 (1979). The protection for customers, in place of the Commission's review of the rates under bond, is the bond, and the ultimate true-up that occurs at the conclusion of the appeal with twelve percent interest paid to customers on any amount determined to be subject to refund.

C. The Consumer Advocate misses the point as related to the prohibition on retroactive ratemaking; the deferral granted by the Commission is inadequate.

The cases cited by the Consumer Advocate related to its position on retroactive ratemaking do not support the proposition that the Company is guaranteed to recover the revenues unlawfully stayed by the Commission or the lost time value of those revenues, and neither of the cases elucidates a remedy for the Company's degraded liquidity in the meantime.[2] The deferral request

not filed its rate schedules on reconsideration. For clarity, and for the Consumer Advocate's reference, the Company made this filing—and served it on the Consumer Advocate—on June 8, 2020 following the Commission's directive on reconsideration.

[2] The opinions cited by the Consumer Advocate, *Hamm v. S.C. Pub. Serv. Comm'n*, 294 S.C. 320 (1988) and *Porter v. S.C. Pub. Serv. Comm'n*, 328 SC 222, (1997), reference the deferred recovery of carrying costs and the amortization of rate case expenses, not the implementation of rates under bond, much less the unprecedented and unlawful stay applied in this case.

the Company was forced to file with the Commission in this case was a necessary but incomplete remedy to avoid a taking from the Commission. The only complete remedy is that which is provided by the Bond Provision: the implementation of rates under bond.

As for the Company's representation in its deferral request that the deferral would enable it to have continued access to capital, there are gradations of access to capital and liquidity along a spectrum. Certainly the preferred option, which provides immediate liquidity in the form of increased billed revenues, is that which is plainly provided for in the Bond Provision, i.e., the immediate implementation of higher rates under bond. Anything short of implementing rates under bond results in decreased liquidity and access to capital (i.e., irreparable harm to the Company). Secondary to implementing rates under bond is a deferral for which future recovery is probable, which can be properly accounted for as a regulatory asset and can support, to some degree, the Company's cash flow through credit, which has its own costs and shortcomings. A deferral for which future recovery is <u>not probable</u> cannot be accounted for as a regulatory asset, cannot be borrowed against, and cannot support the Company's cash flow through credit. For these reasons, these gradations of accounting treatment (immediate revenue, regulatory asset, no regulatory asset) impact how the Company obtains cash and on what terms, and demonstrate the inadequacy of a deferral as compared to the relief authorized by the Bond Provision.

The Return misrepresents the recoverability risk for the Company of deferrals. While the Consumer Advocate states that the nature of the future review of the deferral will be limited to its "numerical value," as explained in the Petition, the Commission has granted deferrals and then later denied their recovery, including in the instant underlying case as explained in the Petition and, in other cases, permitted recovery of deferred costs but denied recovery of the associated time value or financing costs. *See, e.g.*, Order No. 2019-323, Docket No. 2018-319-E (May 21, 2019) (denying Duke Energy Carolinas, LLC recovery of carrying costs on properly deferred costs);

Order No. 2019-341, Docket No. 2018-318-E (May 21, 2019) (denying Duke Energy Progress, LLC recovery of carrying costs on properly deferred costs). Further, as explained in the Petition, the Commission's directive states that the granting of the deferral "will not prejudice the right of any party to address or challenge ***the recovery of these costs*** in a subsequent rate proceeding." Exhibit F to the Petition (Aug. 31, 2020 Directive, Docket No. 2019-290-WS) (emphasis added). Based upon this language, it is clear that the future consideration of recovery will not be limited to the "numerical value" or whether the amounts were "accurately recorded," but rather "recovery" *in toto*. It is clear that the contingent approval of a deferral is not an adequate remedy for the Commission's unlawful stay of the Company's implementation of rates under bond.

D. The Commission acted *ultra vires* when it ignored the Bond Provision and stayed the implementation of rates under bond.

The Consumer Advocate grasps at a number of statutes—S.C. Code Ann. §§ 58-5-210, 58-5-290, 58-5-300, and 58-5-320—to attempt to support its argument that the Commission has authority to stay the Company's implementation of rates under bond. The plain language of the Bond Provision, however, is that a utility may implement rates under bond as long as the bond is "in a reasonable amount approved by the Commission, with sureties approved by the Commission." The Commission has provided such approval, and confirmed in the associated directive precisely this extent of its authority. As explained in the Petition, the Bond Provision also permits substitutions "for the bond" but, by its plain language, the Bond Provision does not authorize the Commission to create novel arrangements that eliminate a utility's access to increased revenues during the pendency of the appeal. The Commission is a creature of statute and has only those powers granted to it by the General Assembly. Administrative agencies "must follow statutory established standards and not their ideas of what would be charitable or equitable, and may not ignore or transgress the statutory limitations on their power, even to

accomplish what they may deem to be laudable ends, such as service of the public interest." 73 C.J.S. Public Administrative Law and Procedure § 163 (2020).

CONCLUSION

The Company believes that the requested supersedeas is warranted and necessary in this case to correct the unlawful decision-making by the Commission that has daily and ongoing punitive effects on the Company. The Company appreciates the Court's consideration of its request.

Respectfully submitted,

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October 12, 2020

In Re: Application of Blue Granite Water Company
For Approval to Adjust Rate Schedules and Increase Rates
Appellate Case No.*: 2020-001283*
Exhibit to Reply to Return to Petition for Writ of Supersedeas

Exhibit A

Blue Granite Water Company

Request for Rehearing of Commission Order No. 2020-549

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

Docket No. 2019-290-WS

In Re:	)	
	)	
Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates	)	Petition for Reconsideration of Blue Granite Water Company
	)	

Pursuant to S.C. Code Ann. §§ 1-23-380 and 58-5-330, S.C. Code Ann. Regs. 103-854, and applicable law, Blue Granite Water Company ("Blue Granite" or the "Company") hereby petitions the Public Service Commission of South Carolina ("Commission") to reconsider its stay of the Company's implementation of rates under bond imposed by Order No. 2020-549 and maintained by the Commission's August 31, 2020 directive. The stay is an *ultra vires* act that exceeds the bounds of the Commission's authority. The stay also constitutes arbitrary and capricious decision-making and violates the Company's substantive due process rights by depriving the Company of a statutorily granted property interest. Because the Commission has approved the Company's proposed bond, it has no authority to prevent the Company from implementing the rates secured by the bond and must now issue its final order approving the bond, or affirm that the bond has been approved, and rescind its stay orders. While the regulatory asset authorized by the Commission was necessary to protect the Company's potential ability to recover the revenues to which it is entitled, there is no adequate substitute for the Commission issuing final approval of the bond and permitting the Company to implement rates under bond.

I. The Commission lacks authority to stay the implementation of rates under bond.

The Commission lacks the authority to stay the implementation of a utility's rates under bond, and such a stay is therefore an *ultra vires* act. The South Carolina Supreme Court has concluded the following concerning the limits on administrative agencies' authority:

> It is elementary law that administrative agencies are creatures of statute and their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. . . . Such (administrative) bodies, being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted. . . . Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.

Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 408 (1965) (internal citations omitted). The narrow ambit of the Commission's authority as related to rates under bond granted by S.C. Code Ann. § 58-5-240(D) (the "Bond Statute") is to consider and approve the reasonableness of the amount of the bond and the adequacy of the surety. As the Commission has repeatedly held, it is "without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond," and that the statute grants utilities the authority to "impose its proposed rates under bond as a matter of right . . . ." Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). It is clear from the Bond Statute, and from the Commission's interpretation of the Bond Statute for more than a decade, that the Commission lacks the authority to stay the implementation of rates under bond.

While the Bond Statute provides that "there may be substituted **for the bond** other arrangements satisfactory to the Commission for the protection of parties interested," such does not confer upon the Commission the authority to stay a utility's right to implement rates under

bond. S.C. Code Ann. § 58-5-240(D) (emphasis added). The substitution authorized by the statute is "for the bond," not for the utility's statutorily authorized option to implement rates that are secured by a bond or by some other substitute arrangement. *See Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 543 (1992) ("In interpreting a statute, it is imperative that the statute be accorded its clear meaning."). Previous substitute arrangements have included, for example, letters of credit and letters of undertaking while the utility implemented new rates. *See* Order No. 1982-491, Docket No. 1982-247-W (July 14, 1982); Order No. 1981-176, Docket No. 1981-84-S (Mar. 18, 1981); Order No. 1982-218, Docket No. 1982-111-W (Mar. 31, 1982); Order No. 1980-352, Docket No. 1980-162-WS (June 13, 1980). Such types of guarantees[1]—bonds, letters of credit, and letters of undertaking—protect (1) customers by providing a reserve of funds should rates later be reduced and (2) the utility by permitting new rates to go into effect.

A deferral—in contrast to implementing rates protected by a guarantee—provides no certainty of recovery and is therefore not a "substitute" as contemplated and required by the Bond Statute. A deferral is a regulatory accounting mechanism, not a recovery guaranty. Emphasizing the Company's **lack** of guaranty of recovery, in approving the deferral request, the Commission's unanimous motion stated that issuance of the accounting order "will not prejudice the right of any party to address or challenge the recovery of these costs in a subsequent rate proceeding." Aug. 31, 2020 Directive, Docket No. 2019-290-WS. Moreover, the deferral mechanism does not, in stark contrast to implementing rates under bond pending an appeal, subject to potential refund requirement, provide any cash liquidity. While deferrals have a role in utility ratemaking, they are an incomplete and inadequate remedy as compared to implementing rates under bond. While customers would be protected by the bond obtained by the Company, there is no similar protection

[1] "Guarantee" is defined as "[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent." Guarantee, Black's Law Dictionary (11th ed. 2019).

for the utility in the approved deferred accounting authority. Further, the prohibition on retroactive ratemaking serves to prevent the Company from retroactively correcting its rates at the conclusion of its appeal. There is, therefore, no substitute for implementation of rates that are secured, whether by a bond, letter of credit, letter of undertaking, or otherwise.

Notwithstanding the adequacy or inadequacy of a regulatory asset as a substitute for implementing rates under bond, the approval of a regulatory asset does not resolve the Commission's simple lack of authority to stay the implementation of rates under bond and its acting beyond the authority granted by the General Assembly in the Bond Statute. "Administrative discretion can be exercised *only . . . in accordance with the standards prescribed by statute or ordinance*." *Atlantic Coast Line R. Co. v. S.C. Pub. Serv. Comm'n*, 245 S.C. 229, 235 (1965) (emphasis added) (citing *Hodge v. Pollock*, 223 S.C. 342 (1953). While the Commission has the authority to identify and approve the implementation of a substitute <u>to the bond</u> under the Bond Statute, such does not go so far as to empower the Commission to stay the implementation of rates under bond.

I. <u>The Commission's stay on the implementation of rates under bond violates the Company's substantive due process rights by depriving the Company of a property interest granted by state law, and is itself arbitrary and capricious decision-making.</u>

Because the Commission's stay deprives the Company of a property interest in the revenues obtained from the rates under bond, the stay violates the Company's substantive due process rights. Additionally, the Commission's stay constitutes arbitrary and capricious decision-making.[2] As explained above, the Commission has routinely and repeatedly held that it is without

[2] *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184, 332 S.E.2d 539, 541 (S.C. Ct. App. 1985)(A decision is deemed arbitrary if it is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.").

discretion to prohibit utilities from imposing rates under bond, and that the statute grants utilities the authority to implement rates under bond "as a matter of right." Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). Indeed, the Company holds a due process right to implement rates under bond, and the Commission's action to stay the utility's implementation of rates under bond arbitrarily and capriciously deprives the Company of this right.

The South Carolina Supreme Court has provided guidance on this issue:

> [T]o prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Thus, parties claiming such violations must first show they have a legitimate property interest.
>
> Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. To determine if the expectation of entitlement is sufficient will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the agency.

Grimsley v. S.C. Law Enforcement Div., 396 S.C. 276, 283-84 (2012) (emphasis added) (internal citations omitted) (*Grimsely*). The Bond Statute provides clear, "mandatory language that restricts the discretion of the agency." The Company undeniably holds a property interest in the revenues resulting from implementing rates under bond pursuant to the Bond Statute. The discretion of the Commission is extremely narrow in approving the amount of the bond and the surety (which it has done), and the Commission has unwaveringly found that the Bond Statute grants utilities the authority to implement rates under bond "as a matter of right."

The Commission's stay is an arbitrary and capricious (and punitive) act against Blue Granite. Never before has the Commission determined that it has discretion or flexibility as related

to a utility's right to implement rates under bond. As noted, the Commission has repeatedly found that it, in fact, "is without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond." Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). Further, despite its broad finding in the August 31, 2020 directive that the pandemic is causing "troubling effects" for South Carolina utility customers, the Commission's actions have been against Blue Granite alone. On August 20, 2020, the Commission issued Order No. 2020-561, authorizing a significant rate increase for Palmetto Utilities, Inc. to begin on September 20, 2020. Further, although the Commission's very recent actions have been against Blue Granite alone, as far back as May 14, 2020—in Docket No. 2020-106-A, a generic docket applicable to all South Carolina regulated utilities—while thanking the state's utilities "for their work and actions during the COVID-19 State of Emergency," the Commission rescinded the broad-based customer protections it had implemented in March 2020. Order No. 2020-374, Docket No. 2020-106-A (May 14, 2020). Now, nearly four months later, the Commission finds that due to the "troubling effects of the COVID-19 pandemic,"[3] Blue Granite's customers should be spared from the rates under bond to which the utility is statutorily entitled. In summary, the Commission overturned more than a decade of its own precedent finding that it had no discretion as related to rates under bond, approved another similarly situated utility's rate increase, and rescinded the broad customer protections it had implemented in March 2020, but will not permit Blue Granite to implement rates under bond. This conduct is patently arbitrary and capricious, and amounts to a violation of the Company's substantive due process rights.

[3] Aug. 31, 2020 Directive, Docket No. 2019-290-WS.

As explained in the Company's letter to the Commission dated August 13, 2020, Blue Granite has taken and is taking significant actions to assist customers during the pandemic. First, the Company voluntarily delayed the implementation of increased rates until September 1, 2020, a delay of nearly five months after the Commission's issuance of an order on the Company's application, causing Company to forego approximately $2 million of revenues from customers to the Company. Additionally, to its knowledge, Blue Granite was the first utility in South Carolina to suspend nonpayment disconnections, an accommodation it initiated on March 10, 2020, several days before Governor McMaster issued Executive Order No. 2020-08 and requested that utilities suspend nonpayment disconnections, and more than a week before the Commission issued Order No. 2020-228 effectuating same. The Company also suspended its collection processes and the assessment of late charges effective March 10, 2020, and reconnected those customers shut off for non-payment back to March 1, 2020. Additionally, the Company has continued its practice of referring customers who are unable to make payment to assistance agencies, as well as continuing to establish long-term payment arrangements for customers who fall behind on bills. Blue Granite should not now be singled out, particularly in light of the actions the Company continues to take for the benefit of customers.

II. Because the Commission has approved by unanimous vote the Company's proposed bond, it must now issue its final order approving the bond or affirm that the bond approval has been granted.

As required by the Bond Statute, the Commission has approved the Company's bond and surety. Such approval was granted by unanimous vote in a business meeting of the Commission on July 15, 2020 and memorialized by a directive issued on the same day, which reads:

> I move that the Commission find the proposed bond amount reasonable and Liberty Mutual Insurance Company an acceptable surety to ensure that ratepayers are protected and would be reimbursed with interest in the event Blue Granite's appeal is unsuccessful, and I move that the Commission approve the requested bond.

The Commission should affirm that this unanimous vote constitutes the approval required by the Bond Statute. Should the Commission find that it instead needs to issue a final order, it should do so promptly. The issuance of a final order is ministerial in nature, and "[i]t is the positive duty of the commission to decide matters properly submitted within its jurisdiction without unreasonable delay." *City of Columbia v. Pearman*, 180 S.C. 296 (1936); *see id.* ("The city is entitled to the writ. The Commission was under a plain ministerial duty to render a decision on the merits. It has expressly refused to decide. Mandamus is the proper remedy."). Further, for the Commission's convenience, the Company filed a proposed order approving the bond on August 7, 2020.

Establishment of the regulatory asset authorized by the Commission in the August 31, 2020 directive is an inadequate remedy. As indicated in the Commission's directive and explained above, unlike implementing rates under bond, future recovery of a regulatory asset is not guaranteed, and it is therefore not a substitute for implementing rates under bond. As explained in the Commission's August 31, 2020 directive, issuance of the accounting order "will not prejudice the right of any party to address or challenge the recovery of these costs in a subsequent rate proceeding." While the regulatory asset was necessary to protect the Company's potential ability to recover the revenues to which it is entitled, there is no adequate substitute for the Commission issuing final approval of the bond and permitting the Company to implement rates under bond.

III. Conclusion

The Commission should reconsider the stay of the Company's implementation of rates under bond because it has no authority to impose such a stay, and because the stay violates the Company's substantive due process rights by arbitrarily and capriciously depriving it of a statutorily granted property interest. Further, because the Commission has approved the

Company's proposed bond, it must affirm that it has provided the approval required by S.C. Code Ann. § 58-5-240(D), or issue a final order memorializing same.

Respectfully submitted,

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September 4, 2020

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
Docket No. 2019-290-WS

IN RE:	)	
Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates	)	CERTIFICATE OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of the **Petition for Reconsideration of Blue Granite Water Company** in the referenced matter to the parties listed below by electronic mail:

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Dated at Columbia, South Carolina, this 4th day of September, 2020.

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